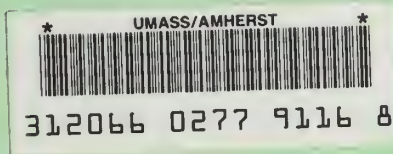


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GUIDELINES CONCERNING THE PUBLIC'S RIGHT OF ACCESS TO JUDICIAL PROCEEDINGS

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**SUPREME JUDICIAL COURT
JUDICIARY/MEDIA STEERING COMMITTEE**
October 1996

October 10, 1996

Dear Judges, Clerk Magistrates, Media Representatives:

The **Guidelines Concerning the Public's Right of Access to Judicial Proceedings** were developed by the Supreme Judicial Court's Judiciary/Media Steering Committee in an effort to assist you in identifying relevant court rules, statutes and case law covering a variety of issues which relate to judicial proceedings. These **Guidelines** have not been promulgated by the Supreme Judicial Court or the Trial Court, and, therefore, should not be regarded as binding. The **Guidelines** are intended to aid you as an additional professional resource and are to be used with your discretion.

As Co-Chairs of the Judiciary/Media Steering Committee we wish to Acknowledge the considerable efforts of the Hon. E. Susan Garsh, an Associate Justice of the Superior Court and a member of the Judiciary/Media Steering Committee, for producing these **Guidelines** on behalf of the Committee. We also wish to thank Abigail Roth, a former SJC law clerk, for her able assistance with this project.

We hope that these **Guidelines** will be a valuable resource to the judiciary and the media for the benefit of the public. The materials may be reproduced without obtaining permission from the Judiciary/Media Steering Committee. If you have questions concerning these **Guidelines**, contact the SJC's Public Information Office at (617) 557-1114.

Sincerely,



William B. Ketter, Co-Chair
Editor, The Patriot Ledger



John M. Greaney, Co-Chair
Associate Justice, Supreme Judicial Court

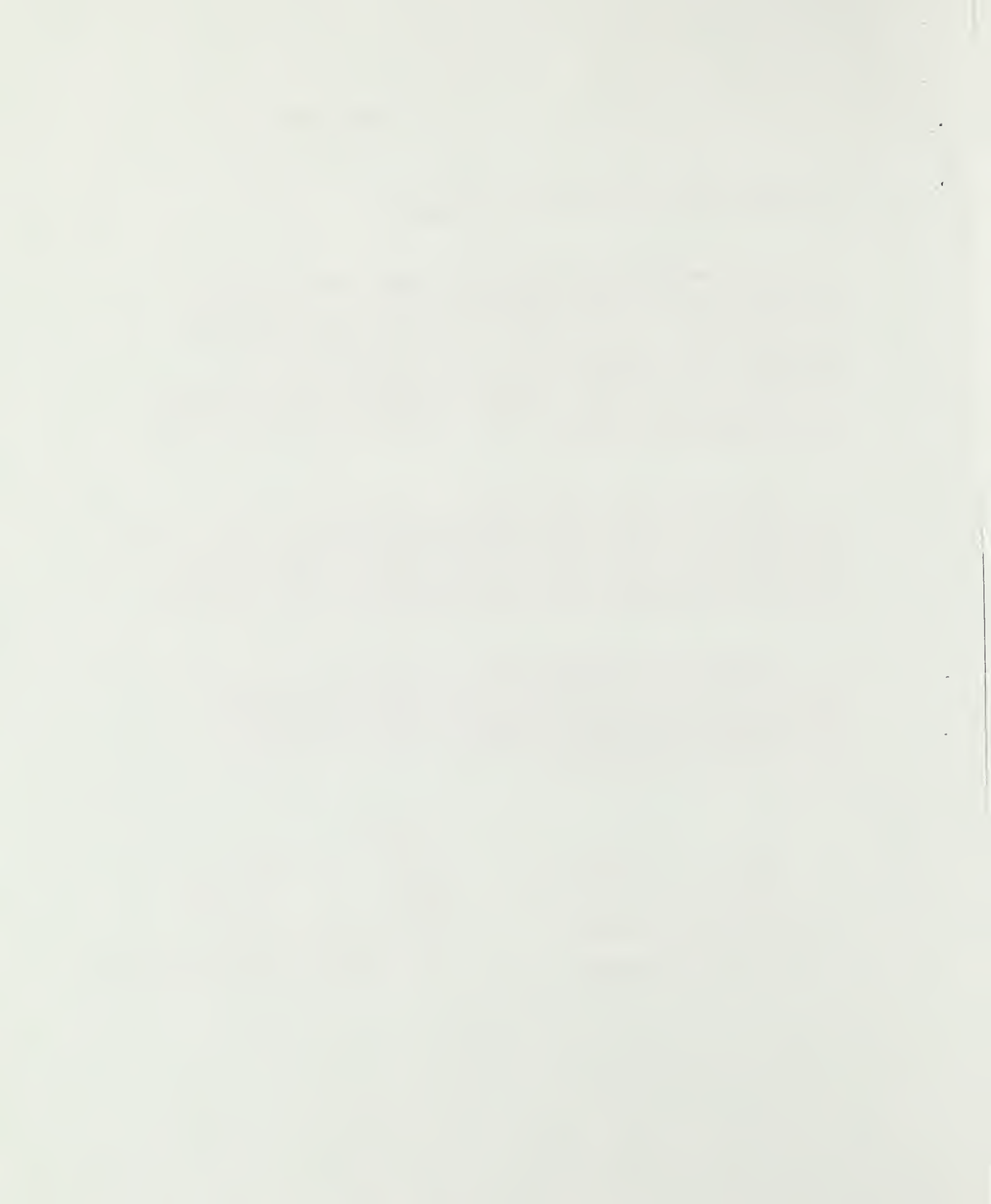


Table of Contents

	<u>Page</u>
I. General Principle of Publicity	1
II. Judicial Proceedings	1-3
III. Judicial Records	4-8
IV. Restraints on Speech and Publication	8-10
V. Miscellaneous Issues	10
VI. Reference Materials	11
Endnotes	12-34

GUIDELINES CONCERNING THE PUBLIC'S RIGHT OF ACCESS TO JUDICIAL PROCEEDINGS

I. GENERAL PRINCIPLE OF PUBLICITY

Judicial proceedings should not be shrouded in secrecy. Access fosters informed public discussion of governmental affairs. Only the most compelling reasons justify the closure of judicial proceedings or the nondisclosure of judicial records. Access to judicial records and proceedings shall not be restricted to any class or group of persons.¹ The media's right of access to judicial proceedings and records derives entirely from the public's right of access. The media has neither a greater nor a lesser right to be present than any other member of the public.²

II. JUDICIAL PROCEEDINGS

A. Framework: There is a recognized common law and/or constitutional qualified right of access by the public to most criminal and civil proceedings.³ When a qualified First Amendment right of access attaches to a proceeding, the proceeding cannot be closed unless specific, on the record, findings are made demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve that interest."⁴ Thus, if the interest asserted is the right of the accused to a fair trial, the proceeding only shall be closed if specific findings are made demonstrating, first, that there is a substantial probability the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent⁵ and, second, that reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights.⁶ The trial court should consider all reasonable alternatives to closure and fashion a closure order that is no broader than necessary.⁷

B. Procedural Issues: Those who oppose the entry or maintenance of a closure order must be given an opportunity to be heard by the trial court.⁸ One need not file a formal motion to intervene in order to be heard in opposition to the order.⁹ The hearing contesting closure should be completed expeditiously.¹⁰ A closure order is immediately appealable.

C. Specific Proceedings:

1. Presumptively Open:

- a. Arraignment.¹¹
- b. Bail hearings.¹²
- c. Probable cause hearings.¹³
- d. Voir dire.¹⁴
- e. Suppression hearings.¹⁵
- f. Trials, even during the testimony of a minor sex offense victim.¹⁶
- g. Post-trial hearings.¹⁷
- h. Juvenile proceedings in which the minor is charged with murder in the first or second degree.¹⁸
- i. Proceedings to extend control of the Department of Youth Services over a person beyond the age of eighteen.¹⁹
- j. Plea hearings and sentencing hearings.²⁰

2. Closed Proceedings:

- a. Inquests.²¹
- b. Juvenile proceedings, except when the minor is charged with murder in the first or second degree.²²
- c. Grand jury proceedings.²³



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3. No Right of Attendance:

a. Depositions.²⁴

b. Lobby conferences and side-bar discussions at trial.²⁵

c. Hearing on application for application for criminal complaint presumptively closed, but if the application is one of special public significance, and if, in the opinion of the Magistrate, the legitimate interest of the public outweighs the right of privacy of the accused, the hearing may be open to the public.²⁶

D. Television/Cameras/Microphones in the Courtroom:²⁷

1. S.J.C. Rule 3:09, Canon 3(A)(7) provides: "A judge shall permit broadcasting, televising, electronic recording, or taking photographs of proceedings open to the public in the courtroom by the news media for news gathering purposes and dissemination of information to the public," subject to certain limitations, including that "[a] judge may limit or temporarily suspend such news media coverage, if it appears that such coverage will create a substantial likelihood of harm to any person or other serious harmful consequence."²⁸ A trial judge must make specific findings of fact to support a decision to limit such coverage. Fear of jurors being exposed to potentially prejudicial information or of witnesses being exposed to the testimony of other witnesses generally will not be a valid basis for denying such coverage. A judge should not permit broadcasting, televising, electronic recording, or photographing of motion to suppress hearings, motion to dismiss hearings, probable cause hearings, or voir dire hearings.²⁹

2. Even if the potential for harm requires that television cameras be prohibited, S.J.C. Rule 3:09, Canon 3(A)(7) clearly provides that the trial court separately should determine whether electronic recording and/or still photography would create a substantial likelihood of harm to any person or other serious harmful consequence.

E. Sketch Artists: Sketch artists should be permitted in a courtroom, absent extraordinary circumstances in which sketching would disrupt proceedings or distract participants.³⁰ The trial judge, however, has discretion to restrict artists from sketching jury members.³¹

III. JUDICIAL RECORDS

A. Uniform Rules on Impoundment Procedure:

1. Scope: The Uniform Rules explicitly govern impoundment³² of records in civil proceedings in every Department of the Trial Court. Although the Rules do not explicitly govern impoundment in criminal and juvenile proceedings, their application to criminal³³ and certain juvenile³⁴ proceedings has been approved by the Supreme Judicial Court.

2. Key Provisions: A request for impoundment must be made by a written motion accompanied by affidavit. Ex parte relief may be granted only upon a showing that immediate and irreparable injury may result. If any order of impoundment is granted without notice, the matter shall be set down for hearing at the earliest possible time, and in any event, within ten days. The court may order notice be given to interested third persons, such as the media. An interested third person may oppose impoundment. An order of impoundment may be entered by the court only after hearing and for good cause shown.³⁵ In determining good cause, the court shall consider all relevant factors including, but not limited to, the nature of the parties and the controversy, the type of information and the privacy interests involved, the extent of community interest, and the reason(s) for the request. Agreement of all parties or interested third persons in favor of impoundment is not, in itself, sufficient to constitute good cause. An order of impoundment, whether ex parte or after notice, may be made only upon written findings and must specify the duration of the order.³⁶ A party or interested third person may move to modify or terminate an order of impoundment. An order impounding or refusing to impound material is subject to review by a single justice of the appellate court.³⁷ Before a party appeals to a single justice, the party should seek written findings from the trial judge.³⁸

B. First Amendment Qualified Right of Access: In addition to the common law presumption of access to judicial records,³⁹ the First Amendment may provide an independent qualified right of access to judicial records.⁴⁰ This right has been premised on the theory that without access to the documents underlying a judicial

proceeding, the public often would not have a full understanding of the proceeding and, as a result, would not be in a position to serve as an effective check on the system, an underlying reason for the First Amendment right of access to judicial proceedings.⁴¹ Limitations on the First Amendment right of access will be upheld where a court determines, based upon adequate findings, that an overriding interest, narrowly tailored to the circumstances, overcomes the presumptive First Amendment right.⁴²

C. Prompt Rulings Required: Motions challenging an impoundment order should be heard and ruled upon expeditiously.⁴³

D. Code of Professional Responsibility for Clerks of the Courts of the Commonwealth of Massachusetts: Canon 5 requires each Clerk-Magistrate to facilitate public access to court records that, by law or court rule, are available to the public.⁴⁴

E. Photocopies: Access to records includes not only being able to review and make notes about judicial documents, but also being permitted to obtain photocopies at normal rates.⁴⁵

F. Specific Records:

1. Publicly Available (unless properly impounded or sealed):

- a. Alphabetical index of parties in pending criminal or civil cases.
- b. Alphabetical index of parties in closed criminal or civil cases.⁴⁶
- c. Docket books.
- d. Case files, including those of criminal cases in which a defendant has been acquitted, a finding of no probable cause has been made by the court, or the action has been dismissed or nolle prossed by a judge.⁴⁷
- e. Daily trial lists.

- f. Judge's required statement of reasons for not imposing a committed sentence of an offense under G.L. c. 265.
- g. Allowed applications for criminal complaint.
- h. Juvenile records involving juveniles accused of murder in the first or second degree.⁴⁸
- i. Case files for proceedings to extend control of the Department of Youth Services over a person beyond the age of eighteen.
- j. Search warrants, applications for search warrants, and supporting affidavits, once the warrants and affidavits have been returned to the court.⁴⁹
- k. Abuse prevention cases (c. 209A) in which neither party is a minor and the plaintiff has not requested impoundment of his or her address.⁵⁰
- l. Exhibits.⁵¹
- m. Documents filed with the court in connection with a consent decree or settlement.⁵²
- n. Discovery documents admitted into evidence.⁵³
- o. Names and addresses of jurors in both the grand jury and trial jury venires.⁵⁴
- p. Jury questionnaires used to supplement or in lieu of oral voir dire.⁵⁵
- q. Names and addresses of trial jurors while a case is pending.⁵⁶
- r. Names and addresses of trial jurors after mistrial or verdict.⁵⁷

2. Not Publicly Available:

- a. Cases and materials properly impounded or sealed.
- b. Grand Jury records, including cases automatically sealed because of grand jury “no bill.”⁵⁸
- c. Dismissed first offense marijuana or Class E controlled substance cases.⁵⁹
- d. Dismissed, “not guilty,” or nolle prossed controlled substance cases.⁶⁰
- e. The Commissioner of Probation is required to seal certain old records of criminal court appearances and dispositions, if requested by the person having such records and if certain conditions are met.⁶¹
- f. Confidential juror questionnaires included with summons.⁶²
- g. Cases for which the defendant has received a gubernatorial pardon and which the governor has directed be sealed.⁶³
- h. Affidavits made in support of an application for a search warrant, between issuance and return of the warrant.⁶⁴
- i. Plaintiff’s address in abuse prevention cases in which plaintiff has requested impoundment of the address.⁶⁵

3. Public Access Made Discretionary by Statute or Court Guidelines:⁶⁶

- a. Mental health examination and commitment records, other than ordinary entries on the criminal docket.⁶⁷
- b. Alcoholic commitment records.⁶⁸
- c. Names of sexual assault victims.⁶⁹

- d. In certain circumstances, inquest reports and transcripts.⁷⁰
- e. A justice of the Juvenile Court may release juvenile court records to the public if they are not records of completed proceedings sealed by the Commissioner of Probation. In the absence of an order releasing the records, the records shall be withheld from public inspection.⁷¹
- f. In actions to establish paternity or in which the paternity of a child is an issue, all complaints, pleadings, papers, documents, or reports filed in connection therewith, and docket entries, shall not be available for public inspection unless a judge of the court where such orders are kept "for good cause shown" shall otherwise order.⁷²
- g. Abuse prevention cases where either party is a minor.⁷³
- h. Pending or denied applications presumptively sealed unless the Clerk-Magistrate or a judge concludes that the legitimate interest of the public outweighs the privacy interest of the accused.⁷⁴

IV. RESTRAINTS ON SPEECH AND PUBLICATION

A. Overview: "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."⁷⁵

B. Public: "[T]here is nothing that proscribes the press from reporting events that transpire in the courtroom."⁷⁶ A prior restraint on members of the media preventing pre-trial publicity, therefore, rarely will withstand scrutiny under the First Amendment and only can be entered if the trial judge holds a hearing and makes specific findings that: (1) release of the information will create a clear and present danger to the conduct of the trial; (2) no alternative means are available to avert the harm; and (3) the prior restraint will effectively prevent the anticipated harm. In addition, the First Amendment requires that a restrictive order may not be vague or overbroad with respect to information barred from publication.⁷⁷

"[A]bsent the most compelling circumstances," a court cannot even issue a temporary restraining order prohibiting a newspaper from publishing certain information while it takes time to reflect on the merits of the prior restraint: "[I]t

is misleading in the context of daily newspaper publishing to argue that a temporary restraining order merely preserves the status quo."⁷⁸

C. Attorneys: The Massachusetts disciplinary rules for attorneys prohibit attorneys from engaging in certain forms of speech before and during trial.⁷⁹ These rules essentially restrict attorney speech based on a "reasonable likelihood of prejudice" standard. A proposed Rule of Professional Conduct (Rule 3.6) now exists which would, instead, restrict attorney speech based on a "substantial likelihood of materially prejudicing" standard.

The United States Supreme Court has held that a disciplinary rule using a "substantial likelihood of materially prejudicing" standard to restrain attorney speech does not violate the First Amendment.⁸⁰ However, the constitutionality of Massachusetts' present, less speech-protective restriction has not been tested directly.⁸¹

D. Parties: Massachusetts applies the Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), standard to regulate prior restraints on parties' speech.⁸²

E. Trial Jurors: The issue of media access to jurors is a topic of vigorous debate.⁸³ Post-trial, unless the standard set out in Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), can be met, judges should not forbid the media from speaking with jurors nor forbid jurors from speaking with the media.⁸⁴ It remains unresolved to what extent, if at all, a judge may limit the scope of a reporter's post-trial inquiry into jury deliberations.⁸⁵ A judge may provide a neutral area where the press can interview the jury after the verdict has been rendered and may take steps to prevent harassment of jurors by the press. A judge may inform jurors that they have a right not to speak with the press,⁸⁶ and may remind jurors of the value of their service and the crucial role that trust and confidentiality among jurors plays, in the fulfillment of their duty, by promoting frank discussion during deliberations.⁸⁷ It is preferable for a judge to make any such remarks on the record in open court, in order to prevent subsequent challenges.

F. Grand Jurors and Prosecutors Presenting Cases to a Grand Jury: A judge may direct that an indictment be kept secret until after arrest. If this occurs, the clerk shall seal the indictment and no person may disclose the finding of the indictment except as is necessary for the issuance and execution of a warrant. A person performing an official function in relation to the grand jury may not disclose matters occurring before the grand jury except in the performance of official duties or when

specifically directed to do so by the court.⁸⁸ In their statutory oath, Massachusetts' grand jurors swear not to divulge the testimony given to them as grand jurors, their deliberations, or their votes,⁸⁹ although there is some relaxation of this enforced silence after an indictment has come down.⁹⁰

G. Grand Jury Witnesses: No Massachusetts statute prohibits grand jury witnesses from discussing their testimony, even before an indictment has issued.⁹¹

V. MISCELLANEOUS ISSUES

A. Reasonable Time and Place Limits: Access to judicial records and proceedings is subject to reasonable limitations as to time and place that may need to be imposed to avoid disrupting the orderly functioning of the courtroom or the clerk-magistrates' offices, and to protect the physical security of court records.⁹² Such concerns may not be used as an excuse to deny public access at reasonable times and places.⁹³

B. Rationale for Requesting Access: Persons wishing to review records or attend public proceedings ordinarily should not be required to disclose the reason for their interest.⁹⁴

C. Exhibits: Following a civil trial, the clerk may return exhibits to the parties after the signing of a receipt acknowledging the return of the exhibits. Whether the court can order the parties to make these records available to the media or to retain such records beyond the appeals period has not been litigated in Massachusetts.⁹⁵

D. Tape-recorded Proceedings: A cassette copy of the original recording of an officially tape-recorded proceeding which was open to the public is available upon request, unless the record of the proceeding has been sealed or impounded.⁹⁶

VI. REFERENCE MATERIALS

A. For the Press:

1. The Reporter's Key: Rights of Fair Trial and Free Press, National Conference of Lawyers and Representatives of the Media (American Bar Association 1994).

To order, write: Publication Orders, American Bar Association, P.O. Box 10892 Chicago, IL 60610-0892; or call: (312) 988-5522; or fax: (312) 988-5568. The product code for ordering purposes is PC 448-0000.

2. Massachusetts Journalists' Court and Legal Handbook (Massachusetts Bar Association 1996).

For questions about the publication, write: Director of Media and Public Relations, Massachusetts Bar Association, 20 West Street, Boston, MA 02111-1218.

B. For Judges:

1. Communications Law (Practicing Law Institute).

To order, call: (212) 765-5700; or fax: (800) 321-0093. The order number is G4-3924, Dept. BAV4.

ENDNOTES

1. The public records statute, G.L. c. 66, § 10, does not apply to records of the judicial branch. Sanford v. Boston Herald-Traveler Corp., 318 Mass. 156, 157 (1945).

2. Boston Herald, Inc. v. Superior Court, 421 Mass. 502, 505 (1995).

3. A quartet of Supreme Court decisions articulated a First Amendment right of access to criminal proceedings. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)(First Amendment guaranteed the public the right to attend criminal trials); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603 (1982)(striking down a rule of automatic mandatory closure of the courtroom during the testimony of minor victims in sexual offense trials); Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984)(First Amendment right of access to a criminal trial applied to voir dire hearing); Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986)(First Amendment right of access to a criminal trial applied to a preliminary hearing). These cases articulated a two-part test for determining whether a right of access applies to a particular proceeding: (1) the proceeding must have an historic tradition of openness and (2) the public's access must play a significant positive role in the functioning of the particular process in question.

A criminal defendant has a Sixth Amendment right to a public trial.

Neither the First Amendment nor the Sixth Amendment rights are absolute. In limited circumstances the public may be barred from criminal proceedings. See, e.g., Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982)(citations omitted)("[a]lthough the right of access to criminal trials is of constitutional stature, it is not absolute. But the circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest").

Although the Supreme Court has not held that the First Amendment right of public access applies to civil proceedings, several federal circuit courts have recognized a First Amendment public right of access to civil trials. See, e.g., Publicker Industries, Inc. v. Cohen, 733 F.2d 1059 (3d Cir. 1984)(First Amendment secures to the public and the press a right of access to civil proceedings); Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165 (6th Cir.), reh'g denied, 717 F.2d 963 (6th Cir. 1983), cert. denied, 465 U.S. 1100 (1984)(same); see also Richmond Newspapers, Inc., 448 U.S. at 580 n.17 (1980)(question of whether public has a First Amendment right to attend civil trials was

not raised in case, but noting "that historically both civil and criminal trials have been presumptively open"); Poliquin v. Garden Way, Inc., 989 F.2d 527, 533 (1st Cir. 1993)("[o]pen trials protect not only the rights of individuals, but also the confidence of the public that justice is being done by its courts in all matters, civil as well as criminal"). The First Circuit never explicitly has decided whether the First Amendment creates a right of public access to civil trials. See United States v. Three Juveniles, 61 F.3d 86 (1st Cir. 1995), cert. denied sub nom. Globe Newspaper Co. v. United States, _U.S._, 116 S.Ct. 1564, 134 L.Ed.2d 664 (1996).

In any event, "free access to civil trials is well established under the common law." Boston Herald, Inc. v. Superior Court, 421 Mass. 502, 507 n.7 (1995). Cf. Globe Newspaper Co. v. Commonwealth, 407 Mass. 879, 884 (1990)("[t]he tradition in the Commonwealth is that courts are open to the public. In the absence of a statute, a rule of court, or a principle expressed in an appellate opinion authorizing or directing a courtroom to be closed, the expectation is that courtrooms will be open").

4. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984).

5. Findings demonstrating there is a "reasonable likelihood" that publicity will prejudice a defendant's fair trial rights will not justify a closure order. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 14 (1986).

6. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 14 (1986).

7. Alternatives to closure include searching jury voir dire, sequestration of witnesses or jurors, change of venue, emphatic jury instructions, and postponement of the trial. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563-64 (1976).

8. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 609 n.25 (1982)(citation omitted) ("representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion'").

9. Globe Newspaper Co. v. Superior Court, 379 Mass. 846, 865 (1981), judgment vacated on other grounds, 457 U.S. 596 (1982)(one "need not file a formal motion to intervene").

10. Globe Newspaper Co. v. Superior Court, 379 Mass. 846, 865 (1981), judgment vacated on other grounds, 457 U.S. 596 (1982)("the hearing should be completed expeditiously").

11. Boston Herald, Inc. v. Superior Court, 421 Mass. 502, 505-07 (1995)(affirming single justice decision that complaint seeking injunctive relief and declaration that the press constitutionally could not be excluded from an arraignment held in a hospital room was moot, but nevertheless reiterating the principles that govern the closure of judicial proceedings).
12. In re Globe Newspaper Co., 729 F.2d 47 (1st Cir. 1984)(First Amendment right of access extends to bail hearings).
13. El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147 (1993)(Puerto Rico's requirement of private preliminary hearing unless defendant requests otherwise violates First Amendment); Press Enterprise Co. v. Superior Court, 478 U.S. 1, 13-14 (1986)(citation omitted)(qualified First Amendment right of access attaches to preliminary hearings).
14. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984)(qualified First Amendment right of access attaches to jury voir dire in criminal case); Globe Newspaper Co. v. Commonwealth, SJ 90-172 (Apr. 17, 1990)(Lynch, J.)(vacating order excluding public from voir dire proceedings). To protect the legitimate interests of prospective jurors, the general nature of the voir dire should be made known to each juror at the outset of the questioning, and those individuals believing public questioning will prove damaging to them may request an opportunity to present the problem to the judge in camera, but on the record and with counsel and the defendant present. If limited closure is ordered, the constitutional values sought to be protected by open proceedings may be satisfied later, by making a transcript of the closed proceedings available within a reasonable time if the judge determines that disclosure can be accomplished while safeguarding jurors' privacy interests. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 512 (1984)(if transcript of voir dire is released, a valid privacy right may rise to such a level that part of the transcript should be sealed or the name of a juror withheld).
15. The Supreme Court has not explicitly held that there is a First Amendment right of access to suppression hearings. But see Waller v. Georgia, 467 U.S. 39 (1984)(under the Sixth Amendment, any closure of a suppression hearing over the objections of the accused must meet the test set out in Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984), and recognizing that in Gannett Co., Inc. v. DePasquale, 443 U.S. 368 (1979), while not reaching the question, a majority of the Justices, one based on First Amendment grounds and four based on Sixth Amendment grounds, concluded the public had a qualified constitutional right to attend pre-trial suppression hearings). Several federal appeals courts have found the First Amendment extends some degree of public access to suppression

hearings. See, e.g., Application of The Herald Co., 734 F.2d 93 (2d Cir. 1984); United States v. Criden, 675 F.2d 550 (3d Cir. 1982); United States v. Brooklier, 685 F.2d 1162 (9th Cir. 1982).

16. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982)(G. L. c. 278, § 16A, as construed by the Massachusetts Supreme Judicial Court to require mandatory closure during the testimony of minor sex victims, violates the First Amendment); Commonwealth v. Martin, 417 Mass. 187 (1994)(based on the decision in Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), criminal proceedings may be closed to the public under G. L. c. 278, § 16A only if: (1) the party seeking to close the hearing advances an overriding interest likely to be prejudiced; (2) the closure is no broader than necessary to protect that interest; (3) the trial court considers reasonable alternatives to closing the proceedings; and (4) the trial court makes findings adequate to support the closure).

17. Globe Newspaper Co. v. Commonwealth, 407 Mass. 879, 883-86 (1990)(citation omitted)(finding a right of access to a post-verdict evidentiary hearing, noting that although the U.S. Supreme Court has not ruled on the public's right of access to post-verdict proceedings, "[w]e find no principled basis for affording greater confidentiality to post-trial . . . proceedings than is given to pretrial matters. The primary justifications for access to criminal proceedings . . . apply with as much force to post-conviction proceedings as to the trial itself").

18. G.L. c. 119, § 65.

19. New England Television Corp. v. Department of Youth Services, SJ 89-205 (May 4, 1989)(Wilkins, J.)("[i]f . . . the prospects for treatment of the former juvenile would be adversely affected by a public hearing on the extension commitment order, the judge, on proper findings of fact, could be warranted in closing the proceedings").

20. In re Washington Post Co., 807 F.2d 383 (4th Cir. 1986)(newspaper has First Amendment right of access to plea and sentencing hearings).

21. Kennedy v. Justice of Dist. Court, 356 Mass. 367, 377 (1969)(all inquests shall be closed to the public and to the news media).

22. G.L. c. 119, § 65. Neither the U.S. Supreme Court, the First Circuit, nor the Massachusetts state courts have addressed whether the First Amendment right of public access attaches to juvenile delinquency proceedings. However, relying on the reasoning in Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), the First Circuit found

that interpreting a federal statute as mandating closure of all juvenile trials would raise “serious First Amendment concerns” and, accordingly, instead construed the statute as permitting presumptive closure, provided that closure was determined on a case-by-case basis. U.S. v. Three Juveniles, 61 F.3d 86 (1st Cir. 1995), cert. denied sub nom. Globe Newspaper Co. v. United States, U.S., 116 S.Ct. 1564, 134 L.Ed.2d 664 (1996). Compare State v. James, 902 S.W.2d 911, 914 (Tenn. 1995)(the party seeking to close a juvenile hearing must shoulder the burden of proof and any closure order must be based on findings of particularized prejudice overriding the public's compelling interest in open proceedings, be no greater than necessary, and be entered only after consideration of reasonable alternatives to closure) with In re T.R., 52 Ohio St.3d 6, 18-19, cert. denied, 498 U.S. 958 (1990)(juvenile court proceedings may be closed if there is a reasonable and substantial basis for believing that public access could harm the child or endanger the fairness of the proceeding, and the potential for harm outweighs the benefits of public access) with Florida Pub. Co. v. Morgan, 253 Ga. 467, 473 (1984)(state may create a rule that juvenile proceedings are presumed closed but the public/press must be given an opportunity to show that the state's or juvenile's interest in a closed hearing is not “overriding” or “compelling”) with Edward A. Sherman Pub. Co. v. Goldberg, 443 A.2d 1252, 1258 (R.I. 1982)(no First Amendment right of access to juvenile proceedings) and In re J.S., 140 Vt. 458, 466 (1981)(same).

23. Globe Newspaper Co. v. Commonwealth, 407 Mass. 879, 887 (1990)(noting that public has no constitutional nor any other right of access to grand jury proceedings).

24. Globe Newspaper Co. v. Commonwealth, 407 Mass. 879, 887 (1990)(noting, in dictum, that public has no constitutional nor any other right of access to depositions). Of course, should the deposition be introduced at trial, its contents would automatically become public. Moreover, in the absence of a protective order, a deposition transcript may be made available to any third party.

25. Globe Newspaper Co. v. Commonwealth, 407 Mass. 879, 887 (1990)(noting, in dictum, that public has no constitutional nor any other right of access to lobby conferences and side-bar discussions at trial). There is a presumptive right, however, to access to a transcript of side-bar conferences or to any recorded lobby conference.

26. See District Court Standards of Judicial Practice, The Complaint Procedure §§ 3.15 and 3:16 (1975). The Standards are not mandatory in application in the sense of statutes or rules. The status of hearings on applications for criminal complaints has not been ruled upon by an appellate court.

27. There is no Federal constitutional right to broadcast, photograph, or electronically record any judicial proceeding or portion thereof. Boston Herald, Inc. v. Superior Court, 421 Mass. 502, 507, n. 8 (1995). Fed. R. Crim. P., Rule 53 bans photography or broadcast of criminal cases.

28. S.J.C. Rule 3:09, Canon 3(A)(7)(a). Two Supreme Judicial Court single justice decisions provide insight into how this rule should be applied.

In The Hearst Corp. v. Justices of the Superior Court, SJ 96-0047 (Feb. 1, 1996)(Wilkins, J.), a single justice denied relief under G. L. c. 211, § 3, finding the trial court judge had not abused her discretion and was not wrong, as a matter of law, in closing an entire trial to electronic recording. The single justice found the judge's decision was warranted by the "special circumstances" of the case, which were: (1) "an established pattern of disruptive conduct by the defendant," a problem which was expected to continue throughout the entire trial, and (2) "a basis for concluding that there [was] a substantial likelihood of harm to witnesses, surviving victims, and others." The single justice found a fear of jurors being exposed to prejudicial information would not be an adequate basis for limiting electronic media coverage of a trial: While it is a valid concern, "[t]he cure is jury adherence to the judge's instructions not to watch, listen to, or read about the trial until the case is over." Similarly, an agreement by the defense and prosecution that electronic media would create a substantial likelihood of harm is not a sufficient reason to limit electronic media coverage.

Despite his ruling, the single justice emphasized that the "strong presumption" of the Canon "is that no media will be excluded from the courtroom," and a trial judge must make specific findings of fact to support any decision to limit electronic news media coverage. Moreover, although the Canon does not expressly order judges to adopt the least restrictive means of achieving the protection they are seeking when they invoke the exception to limit or suspend media coverage, "[i]mplicitly [] the rule requires a limitation or suspension of media coverage only to the extent necessary to eliminate the substantial likelihood of harm or other serious consequence." In addition, the single justice warned that the circumstances of the California case of People v. Simpson "should not be permitted to influence the operation of our Massachusetts rule."

In The Hearst Corp. v. Justices of the Superior Court, SJ-96-0076 (Feb. 29, 1996)(Greaney, J.), a single justice vacated provisions of a trial court order which had excluded television cameras and recording devices from a trial except for during opening statements, closing arguments, charge, verdict, and sentencing.

The single justice emphasized S.J.C. Rule 3:09, Canon 3(A)(7)(a), "favors coverage by the broadcast media, indeed creates a strong presumption in that direction, [and therefore] any limitation of coverage must have a well-documented showing of a

substantial likelihood of harm or harmful consequences." The single justice did not find the trial judge's concerns about the jury being influenced by the media presence to be sufficiently documented to justify limiting the cameras or recording devices: While acknowledging the jury will be aware of the cameras, the single justice stated "the answer is not to bar coverage, but to instruct the jury, as often as necessary, on their role and responsibilities, and to arrange with the media to make [the camera and recording devices] as unobtrusive as possible." There also was not sufficient support for the trial judge's prediction that a witness sequestration order might be impaired by television cameras and recording devices: Witnesses should be instructed to avoid any exposure to media coverage of the trial before they testify. Moreover, with the print media and electronic media reporters in the courtroom, witnesses will have the opportunity to learn of actual testimony if they desire. Finally, the single justice was not swayed by the argument that the media's intense interest in the case made it necessary to limit the electronic media: "The fact that the order was entered in a case that has sparked intense media interest is of marginal relevance. For the most part, the electronic media will only want to broadcast the testimony in trials that are noteworthy, and as to which there has been considerable publicity."

29. S.J.C. Rule 3:09, Canon 3(A)(7)(b). The Canon also calls for the following limitations on the media: During a jury trial, a judge should not permit recording or close-up photographing or televising of bench conferences, conferences between counsel, or conferences between counsel and client; frontal or close-up photography of the jury panel usually should not be permitted; all equipment must be of the type, and positioned and operated in a manner, that does not detract from the dignity and decorum of the proceeding; only one stationary, mechanically silent video or motion picture camera and one silent still camera should be permitted in the courtroom at one time; the equipment and its operator usually should be in place and remain so as long as the court is in session and movement should be kept to a minimum, particularly in jury trials; a judge should require reasonable advance notice from the news media of their request to be present to broadcast, to televise, to record electronically, or to take photographs at a particular session, and in the absence of such notice, may refuse to admit them; and a judge should not make an exclusive arrangement with any person or organization for news media coverage of proceedings in the courtroom. S.J.C. Rule 3:09, Canon 3(A)(7)(c)-(g).

30. See, e.g., KTTC Television, Inc. v. Foley, 7 Media L. Rep. 1094 (Minn. 1981)(sketch artists should be permitted in courtroom absent extraordinary circumstances in which sketching would disrupt proceedings or distract participants).

31. KPNX Broadcasting Co. v. Arizona Superior Court, 459 U.S. 1302, 1308 (1982)(denying stay of an order requiring sketch artists to clear all juror drawings with court prior to broadcast, finding trial judge was trying to protect the defendant's right to a fair trial, had searched for alternatives to prior restraint, and the restraint was not so "demonstrably impermissible" as to warrant a stay at this point, noting that "of all conceivable reportorial messages that could be conveyed by reporters or artists watching [criminal] trials, one of the least necessary to appreciate the significance of the trial would be individual juror sketches"); Tsokalas v. Purtill, 756 F.Supp. 89 (D. Conn. 1991) (court order prohibiting the publication of identifiable sketches of jurors did not prohibit the media from exercising any First Amendment access right and was a reasonable time, place, and manner restriction, given the court's legitimate concern about unwanted pressure being put on jurors); cf. KPNX Broadcasting v. Superior Court, 139 Ariz. 246 (1984)(order requiring prior court approval of all jury sketches before broadcast an unconstitutional prior restraint, since order was entered without making a showing that it met the Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) test).

32. "Impoundment" means the act of keeping some or all of the papers, documents, or exhibits from a case separate and unavailable for public inspection; it includes the act of keeping dockets, indices, and other records unavailable for public inspection. The Uniform Rules apply to settlement agreements filed with the court. H.S. Gere & Son, Inc. v. Frey, 400 Mass. 326 (1987).

33. Globe Newspaper Co. v. Commonwealth, 407 Mass. 879, 886-87 (1990)(if judge determines portion of transcript from post-trial hearing in a criminal matter should be redacted, judge must make written findings of fact in support of that determination, consistent with the provisions of the Uniform Rules on Impoundment Procedure); Newspapers of New England, Inc. v. Clerk-Magistrate of the Ware Div. of the Dist. Court Dept., 403 Mass. 628, 632 (1988), cert. denied, 490 U.S. 1066 (1989)(citing Uniform Rules on Impoundment Procedure when reviewing a trial court's order impounding an affidavit filed in support of a search warrant issued in the course of a criminal investigation); see also The Boston Herald, Inc. v. Superior Court, 95-J-245 (Apr. 10, 1995)(Laurence, J.)(in the context of a criminal case impounding names and addresses of jurors, transcripts of certain lobby conferences, and trial exhibits, suggesting court should have used formal impoundment procedures under the Uniform Rules on Impoundment Procedure, and objections to impoundment should be made pursuant to these rules).

34. News Group Boston, Inc. v. Commonwealth, 409 Mass. 627, 629 (1991)(procedural history of case reflects that single justice of Supreme Judicial Court had granted plaintiff

access to probable cause portion of juvenile transfer hearing "without prejudice to any party seeking impoundment pursuant to the Uniform Rules on Impoundment Procedure Rules 7 and 8 of the Trial Court Rules").

35. When documents concern a public official's conduct in office, they only may be impounded on a showing of "overriding necessity" based on specific findings. George W. Prescott Pub. Co. v. Register of Probate for Norfolk County, 395 Mass. 274, 279, 282 (1985).

36. Globe Newspaper Co. v. Commonwealth, 407 Mass. 879, 887 (1990)(stating that if Rule 8 written findings are not made, it would be impossible to conduct effective review of an order redacting a portion of a transcript); Boston Herald, Inc. v. Superior Court, 95-J-245 (Apr. 10, 1995)(Laurence, J.)(stating in dictum that if case had been brought as a Rule 8 motion and the trial judge had not made the required written findings, the single justice would have remanded the case to the trial judge to hold a hearing and make the requisite findings). For a good discussion on the kind of specificity that should be included in any order impounding records, see Newspapers of New England, Inc. v. Clerk-Magistrate of the Ware Div. of the Dist. Court Dept., 403 Mass. 628, 638-39 (1988)(Wilkins, J., concurring)(citations omitted), cert. denied, 490 U.S. 1066 (1989)("[n]o general principle, articulated in support of impoundment, can justify an impoundment without case-specific fact-finding. Here, the judge's reason in support of impoundment was based solely on the threat to the criminal defendant's right to a fair trial. . . . The motion judge had to support such a conclusion by showing what facts would be unfairly prejudicial and how the criminal defendant's rights could not be reasonably protected other than by impoundment. . . . The facts the judge relied on [the sparsity of the local population; the fact the warrant was issued on only a showing of probable cause; and the fact that certain information in the affidavits came from many sources, would be suppressible, or would be inadmissible at trial] do not, without more, justify the impoundment").

37. Under the procedure provided by the Uniform Rules, the media no longer have to file a complaint against the clerk of courts to secure access to impounded judicial records. See Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539 (1977)(strangers to an action seeking relief against an impoundment order may bring a civil action in the court which issued it, by joining the clerk of that court in his official capacity and the parties to the action; the action will end in a judgment capable of appeal). Since the language of the Uniform Rules only provides the public with a right to automatic review by a single justice of the Appeals Court, and not a single justice of the Supreme Judicial Court, if a single

justice of the Appeals Court upholds an impoundment order, it appears the media only may challenge the ruling further by filing an Ottaway complaint in the trial court, from which it could obtain a final judgment which eventually could be appealed to the Appeals Court. This procedural question, however, has not been addressed in case law.

38. Boston Herald, Inc. v. Superior Court, 95-J-245 (Apr. 10, 1995)(Laurence, J.)(single justice stating that if he had been presented with a Rule 8 impoundment order without any written findings, he would have remanded the case to the trial judge to hold a hearing and make the required findings; the fact-sensitive nature of an impoundment decision dictates that the resolution of all factual issues underlying the decision be made by a trial, not an appellate, judge).

39. Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978)(recognizing an historically-based, common law right to inspect and copy judicial records and documents). The Uniform Rules on Impoundment Procedure incorporate many of the common law principles surrounding the right to inspect and copy judicial records. H.S. Gere & Sons, Inc. v. Frey, 400 Mass. 326, 332 (1987).

40. Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984)(First Amendment right of access to transcript of voir dire proceeding, based on right of access to voir dire proceeding itself); Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989)(a blanket restriction on access to the records of cases ending in acquittal, dismissal, nolle prosequi, or a finding of no probable cause violates the First Amendment, but a blanket restriction on access to records of cases ending in "no bill" does not violate the First Amendment, since the public has no right to attend grand jury proceedings and therefore has no right to grand jury records); In re Globe Newspaper Co., 729 F.2d 47, 52 (1st Cir. 1984)(establishing a First Amendment right of access to records submitted in connection with criminal proceedings). Claims of access have not been decided under the Massachusetts Declaration of Rights.

41. Globe Newspaper Co. v. Pokaski, 868 F. 2d 497, 502 (1st Cir. 1989); In re Globe Newspaper Co., 729 F.2d 47, 52 (1st Cir. 1984); see also United States v. Antar, 38 F.3d 1348, 1359-60 (3d Cir. 1994)(emphasizing that right of access to voir dire proceedings includes both concurrent access to live proceedings and later access to a written record, stating "[i]t would be an odd result indeed were we to declare that our courtrooms must be open, but that transcripts of the proceedings occurring there may be closed, for what exists of the right of access if it extends only to those who can squeeze through the door?").

42. Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984).
43. Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 507 (1st Cir. 1989) (“even a one to two day delay impermissibly burdens the First Amendment”); Anderson v. Cryovac, Inc., 805 F.2d 1, 9 (1st Cir. 1986) (“[u]ndue delay in responding to requests for relief from protective orders may indeed constitute an infringement of the First Amendment”); Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 551 (1977)(stating special expedition may be needed at every stage of a proceeding challenging an impoundment order).
44. A written or oral complaint may be filed with the Committee on Professional Responsibility for Clerks of Court.
45. See, e.g., United States v. Criden, 648 F.2d 814, 823 (3d Cir. 1981)(“generally the right to copy has been considered to be correlative to the right to inspect”).
46. Globe Newspaper Co. v. Fenton, 819 F. Supp. 89 (D. Mass. 1993)(the Massachusetts Criminal Offender Records Information System violates the First Amendment insofar as it denies public access to court-maintained alphabetical indices of defendants in closed criminal cases without an individualized judicial determination that a particular defendant's name must be sealed or impounded to serve a compelling state interest).
47. Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989)(the public should have access to records of criminal cases ending in dismissal or nolle prosequi unless the Commonwealth can demonstrate the trial court made specific findings showing closure was necessary to achieve a compelling interest; the provision of G. L. c. 276, § 100C which automatically seals records of cases ending with acquittal or a finding of no probable cause is unconstitutional).
48. G.L. c.119, § 65.
49. G.L. c. 276, § 2B. See also Newspapers of New England, Inc. v. Clerk-Magistrate of the Ware Div. of the Dist. Court Dept., 403 Mass. 628 (1988), cert. denied, 490 U.S. 1066 (1989)(affidavit in support of a search warrant is a public document once it is returned to the court both under G. L. c. 276, § 2B and the common law, but there is no First Amendment right of access to the affidavit).
50. G.L. c. 209A, § 8.

51. Courts are divided as to how to deal with requests for permission to copy audio and video tapes that were admitted into evidence. See, e.g., United States v. Edwards, 672 F.2d 1289, 1294 (7th Cir. 1982)(requiring the trial court to start with "a strong presumption" in favor of access, which can be overcome, but only "on the basis of articulable facts known to the court"); United States v. Criden, 648 F.2d 814, 823 (3d Cir. 1981)(there is a "strong presumption that material introduced into evidence . . . [should be accessible] for copying and broader dissemination"); Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 434 (5th Cir. 1981)(adopting a general balancing test that characterizes the public's right of access as typically subordinate to a defendant's competing fair trial rights, stating "we read the [Supreme] Court's pronouncements as recognizing that a number of factors may militate against public access. In erecting such stout barriers against those opposing access and in limiting the exercise of the trial court's discretion, our fellow circuits have created standards more appropriate for protection of constitutional than common law rights"); In re National Broadcasting Co., Inc., 653 F.2d 609, 613 (D.C. Cir. 1981)(courts should deny access only if "justice so requires"); In re National Broadcasting Co., 635 F.2d 945, 952 (2d Cir. 1980)("it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in the courtroom to see and hear the evidence when it is in a form that readily permits sight and sound reproduction").

52. F.T.C. v. Standard Financial Management Corp., 830 F.2d 404 (1st Cir. 1987)(relevant documents which are submitted to and accepted by a court in the course of adjudicatory proceedings become documents to which the common law presumption of public access applies).

53. Poliquin v. Garden Way, Inc., 989 F.2d 527, 533 (1st Cir. 1993)(videotape deposition admitted into evidence at trial and excerpts from interrogatory answers read into the record cannot be sealed after trial except for the most compelling of reasons; the ordinary showing of good cause which is adequate to protect discovery material from disclosure cannot justify protecting such material after it has been introduced at trial since "only the most compelling showing can justify post-trial restriction on disclosure of testimony or documents actually introduced at trial"); cf. Anderson v. Cryovac, Inc., 805 F.2d 1, 7, 13 (1st Cir. 1986)(there is no First Amendment public right of access or common law presumption of access to documents submitted to a court in connection with discovery motions and, therefore, the court may deny public access if good cause is shown).

54. G.L. c. 234, § 67 (not later than ten days in advance of scheduled appearances by jurors, the Office of the Jury Commissioner is required to send to appropriate clerks of

court a list containing the name, address, and date of birth of each juror expected to appear for service and, unless the court orders otherwise, these lists shall be available for public inspection).

55. There is no Massachusetts case law on access to jury questionnaires used to supplement or in lieu of oral voir dire. Several courts in other jurisdictions have held that, because there is a presumptive right of access to the voir dire itself, there is a corresponding presumptive right of access to the questionnaires. See, e.g., United States v. George, 786 F. Supp. 56 (D.D.C. 1992)(public may have access to thirty-six page juror questionnaires for those individuals who appeared for individual voir dire, after deeply personal and private information that the court believed the prospective jurors would wish to keep confidential was redacted); Copley Press, Inc. v. San Diego County Superior Court, 228 Cal. App. 3d 77, cert. denied, 502 U.S. 909 (1991)(court shall provide public access to the questionnaire of an individual juror when the juror is called to the jury box for oral voir dire, but the public shall not have access to questionnaires of venire persons who are not called to the jury box since these questionnaires do not play any part in the voir dire); see also Capital City Press v. Erwin, 619 So.2d 533 (La. 1993)(holding, without providing reasoning, that trial court shall make jury questionnaires of those jurors who appeared for individual voir dire public, although "intensely personal information" shall be redacted).

56. Compare, e.g., Gannett Co., Inc. v. State, 571 A.2d 735 (Del. 1989), cert. denied, 495 U.S. 918 (1990)(no First Amendment right of public access to the names of trial jurors while trial is pending; trial court's decision to order court personnel to keep jurors' names confidential was within its discretion) with, e.g., In re Baltimore Sun Co., 841 F.2d 74 (4th Cir. 1988)(after a jury has been seated, public is entitled to names and addresses of jurors; decision based on common law, rather than constitutional grounds). There is no case in Massachusetts addressing the issue of access to the names and addresses of seated jurors. The names are usually announced in open court during the voir dire as the jurors are seated and the addresses are contained in the venire list. G.L. c. 234, §67.

57. Whether and under what circumstances the names and addresses of trial jurors can be impounded after mistrial or verdict has been contested in the trial courts of the Commonwealth. See Commonwealth v. Longo, 92-1699 (Lauriat, J.)(denying access to names of jurors who had deliberated in a criminal trial); Commonwealth v. Kater, 85-2731 (Dec. 31, 1992)(Lauriat, J.)(interests of justice required denying requests for names and addresses of trial jurors after trial ended in a mistrial; mandated disclosure might have a chilling effect on the court's "ability to secure willing, impartial and unbiased jurors for

the next trial of [the] case"). Interestingly, in Longo and Kater the judge did not impound the transcript of the voir dire, and thus provided the public with an alternative, albeit indirect, route of access to the names and addresses of the trial jurors; cf. Memorandum from Chief Justice Robert L. Steadman to Justices of the Superior Court, Aug. 1, 1989 ("[s]ome members of the press have expressed concern over their inability to obtain the names and addresses of jurors from the various session clerks. . . . These lists are . . . to be available for public inspection upon request, unless the court orders otherwise"). Although a single justice of the Appeals Court has suggested the trial court cannot impound the names and addresses of jurors without conducting a hearing under Rule VIII of the Uniform Rules and making the particularized findings required by those rules, Boston Herald, Inc. v. Superior Court, 95-J-245 (Apr. 10, 1995)(Laurence, J.), and although a single justice of the Supreme Judicial Court has denied a petition to vacate an order which denied access to the names of jurors after trial, News Group Boston, Inc. v. Superior Court Depart. of the Trial Court, SJ-94-0046 (Mar. 10, 1994)(Lynch, J.)(denying relief from order issued in Commonwealth v. Longo), there are no Massachusetts full court appellate decisions on this issue.

In In re Globe Newspaper Co., 920 F.2d 88 (1st Cir. 1990), the First Circuit reversed the trial judge's decision to deny public access to the names and addresses of jurors after the trial had concluded, holding that under the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861, and the District of Massachusetts Plan for Random Selection of Jurors, Massachusetts had chosen to allow jurors' names and addresses to be made public after summons and appearance and, thereafter, to permit impoundment only upon a judge's determination that the "interests of justice" so require. The First Circuit found that a credible threat of jury tampering or a risk of personal harm to individual jurors would meet the "interests of justice" standard, but that jurors' desires for privacy and the trial judge's distaste for exposing the jurors to press interviews did not meet that standard. This holding clearly is limited to federal court cases. However, a Massachusetts federal district court judge has held that there is a First Amendment right to the names and addresses of jurors, wholly apart from the Jury Selection and Service Act and the District of Massachusetts Plan for Random Selection of Jurors. United States v. Doherty, 675 F. Supp. 719, 724-25 (D. Mass. 1987)(Young, J.)(public has a First Amendment right of access to identity of jurors in criminal cases, but, balancing this right against jurors' privacy interests, justifies delaying access for seven days to permit sequestered jurors to rejoin their families, resume their personal lives, and reflect on their service). Assuming that there is a constitutional right of access to the names and addresses of jurors, the degree to which the release of the names can be delayed is a matter that also has been litigated. See, e.g., Sullivan v. National Football League, 839 F. Supp. 6 (D. Mass. 1993)(delaying access to jury list for ten days after verdict in a civil case, finding delay would not hinder

the values espoused by the First Amendment, while giving jurors time to reflect on the experience of jury service and determine what, if anything, they wished to discuss with the press); United States v. Butt, 753 F. Supp. 44 (D. Mass. 1990)(delaying access to jury list for one week after trial without making particularized findings that such a delay is warranted by the individual facts of the case).

58. M.R. Crim. P. Rule 5 (d); Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 509-10, n. (1st Cir. 1989) (upholding prohibition in G.L. c. 276, § 100C on access to the records of “no bills” returned by a grand jury); Matter of Doe Grand Jury Investigation, 415 Mass. 727 (1993)(videotape of a line-up requested by and recorded for grand jury investigating a shooting incident not subject to public disclosure even after investigation and prosecution concluded and even though convicted defendants consented to disclosure; disclosure would “disserve the important public interests of encouraging free disclosure of information to the grand jury and free deliberations”).

59. G.L. c. 94C, § 34. The constitutionality of this mandatory sealing statute has not been tested. In Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989), the court held that the provision of G. L. c. 276, § 100C which called for automatic sealing of cases ending in acquittal or a finding of no probable cause violated the First Amendment, as well as holding that the provision of G.L. c. 276, § 100C which called for the sealing of cases ending in nolle prosequi or dismissal where the court finds “substantial justice would best be served” by the sealing only is constitutional if the records are sealed after a court makes specific findings that sealing is necessary to effectuate a compelling governmental interest.

60. G.L. c. 94C, § 44. The constitutionality of this mandatory sealing statute has not been tested. But see Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989).

61. G.L. c. 276, § 100A (Commissioner “shall” comply with a request to seal records provided: (1) that said person’s court appearance and court disposition records, including termination of court supervision, probation, or sentence for any misdemeanor, occurred not less than ten years prior to said request; (2) that said person’s court appearance and court disposition records, including termination of court supervision, probation, or sentence for any felony, occurred not less than fifteen years prior to said request; (3) that said person had not been found guilty of any criminal offense within the Commonwealth in the ten years preceding such request, except motor vehicle offenses in which the penalty does not exceed a fine of fifty dollars; and (4) the petitioner has not been convicted of any criminal offense in any other state, United States possession, or in a court of federal jurisdiction, except such motor vehicle offenses, as aforesaid, and has not been imprisoned in any state or county within the preceding ten years. This provision does not apply to

certain specified offenses. The constitutionality of this statute has not been tested. But see Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989).

62. G.L. c. 234A, §§ 22 & 23 (juror questionnaires are not public records and “[e]xcept for disclosures made during voir dire or unless the court orders otherwise, the information inserted by jurors in the questionnaires shall be held in confidence by the court, the clerk or assistant clerk, the parties, trial counsel, and their authorized agents”).

63. G.L. c. 127, § 152.

64. G.L. c. 276, § 2B.

65. G.L. c. 209A, § 8.

66. Court guidelines are not mandatory in application in the sense of statutes or rules.

67. G.L. c. 123, § 36A (“[a]ll reports of examinations made to a court pursuant to sections one to eighteen, inclusive, section forty-seven and forty-eight shall be private except in the discretion of the court. All petitions for commitment, notices, orders of commitment and other commitment papers used in proceedings under sections one to eighteen and section thirty-five shall be private except in the discretion of the court . . . ; provided that nothing in this section shall prevent public inspection of any complaints or indictments in a criminal case, or prevent any notation in the ordinary docket of criminal cases concerning commitment proceedings . . . against a defendant in a criminal case”).

68. G.L. c. 123, § 36A.

69. G.L. c. 265, § 24C (that portion of court records which contains the name of the victim in an arrest, investigation, or complaint for rape, assault with intent to rape, indecent assault and battery on a child under the age of fourteen, forcible rape of a child, statutory rape and assault on a child under the age of sixteen with intent to rape “shall” be withheld from public inspection, except with the consent of a justice of such court where the complaint or indictment is or would be prosecuted).

70. Kennedy v. Justice of Dist. Court, 356 Mass. 367, 377-78 (1969)(upon completion of an inquest, the inquest documents shall remain impounded and the inquest judge shall transmit his report and a transcript of the evidence received by him to the appropriate clerk of the Superior Court; if the District Attorney certifies that no prosecution is proposed, or if an indictment has been sought but not returned, or if a prosecution for the death has been completed, or if the Superior Court determines that no criminal trial is likely, then the

Superior Court may order the report and transcript to be made public).

71. G.L. c. 119, § 60A (“[t]he records of the court, including those of a juvenile appeals session . . . shall be withheld from public inspection except with the consent of a justice of such court . . .”). G.L. c. 276, § 100B provides that an individual may request that the Commissioner of Probation seal his or her delinquency file and “[t]he commissioner shall comply with such request provided (1) that any court appearance of disposition including court supervision, probation, commitment or parole, the records for which are to be sealed, terminated not less than three years prior to said requests; (2) that said person has not been adjudicated delinquent or found guilty of any criminal offense within the commonwealth in the three years preceding such request, except motor vehicle offenses in which the penalty does not exceed a fine of fifty dollars nor been imprisoned under sentence or committed as a delinquent within the commonwealth within the preceding three years; and (3) . . . the petitioner . . . has not been adjudicated delinquent or found guilty of any criminal offense in any other state, United States possession or in a court of federal jurisdiction, except such motor vehicle offenses aforesaid, and has not been imprisoned under sentence or committed as a delinquent in any state or county within the preceding three years.” The constitutionality of this statute has not be tested. But see Globe Newspaper Co. v. Pokaski, 868 F.2d 497 (1st Cir. 1989).

72. G.L. c. 209C, § 13.

73. G.L. c. 209A, § 8 (records of cases “where the plaintiff or defendant is a minor shall be withheld from public inspection except by order of the court . . .”).

74. See A Guide to Public Access to District Court Records promulgated by the Administrative Office of the District Court (1990). The status of pending or denied applications has not been ruled upon by an appellate court.

75. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976); see also CBS Inc. v. Davis, -- U.S. --, 114 S.Ct. 912, 914 (1994)(Blackmun, J., in chambers)(citations omitted)(“[a]lthough the prohibition against prior restraints is by no means absolute, the gagging of publication has been considered acceptable only in 'exceptional cases.' Even where questions of allegedly urgent national security, or competing constitutional interests, are concerned, we have imposed this 'most extraordinary remed[y]' only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures”); New York Times Co. v. United States, 403 U.S. 713, 714 (1971)(per curiam)(citations omitted)(“[a]ny system of prior restraints on expression comes to this Court bearing a heavy presumption against its constitutional validity,” and

the state "'carries a heavy burden of showing justification for the imposition of such a restraint'"); Procter & Gamble Co. v. Bankers Trust Co., 1996 WL 91135 (6th Cir. 1996)(noting the Supreme Court never has upheld a prior restraint, even when faced with the competing interests of national security or the Sixth Amendment right to a fair trial).

76. Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966); see also Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 495 (1975)(the First Amendment prevents a state from prohibiting the press from publishing the name of a rape victim where that information had been placed "in the public domain on official court records").

77. Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

78. In the Matter of Providence Journal Co., 820 F.2d 1342, 1351, modified on reh'g by 820 F.2d 1354 (1st Cir. 1986), cert. granted, 484 U.S. 814 (1987), and cert. dismissed, 485 U.S. 693 (1988); see also Procter & Gamble Co. v. Bankers Trust Co., 1996 WL 91135 (6th Cir. 1996)(same).

79. Some of the key prohibitions on speech set out in the rules are:

Lawyers and law firms associated with the prosecution or defense of criminal matters shall not:

- From the time of the issuance of an arrest warrant, or an arrest, or the filing of a complaint, information, or indictment, until the commencement of trial or disposition without trial, make extrajudicial statements that a reasonable person would expect to be publicized that relate to: the character, reputation, or prior criminal record of the accused; the possibility of a guilty plea; the existence of or contents of any confession, admission, ~~or statement given by the accused~~, or his refusal or failure to make such a statement; the ~~performance or results of any examinations or tests~~, or the refusal or failure of the accused to submit to examinations or tests; the identity, testimony, or credibility of a prospective witness; and any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

- During jury selection or trial, make extrajudicial statements that a reasonable person would expect to be publicized that relate to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial. This is not a prohibition on quoting from, or referring without comment to, public records of the court.

- After completion of trial or disposition without trial and prior to sentencing, make extrajudicial statements that a reasonable person would expect to be publicized and that are reasonably likely to affect the imposition of sentence.

The above restrictions also apply to professional disciplinary proceedings and juvenile disciplinary proceedings, when pertinent and consistent with other laws applicable

to such proceedings.

Lawyers and law firms associated with civil actions shall not, during investigation or litigation of the action, make extrajudicial statements, other than quoting from or referring to public records, that a reasonable person would expect to be publicized and that relate to: evidence regarding the occurrence or transaction involved; the character, credibility, or criminal record of a party, witness, or prospective witness; the performance or results of any examinations or tests, or the refusal or failure of a party to submit to such tests; opinions as to the merits or the claims or defenses of a party; and any other matter reasonably likely to interfere with a fair trial of the action. S.J.C. Rule 3:07, DR 7-107.

80. In Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991), the Supreme Court held that the Nevada Supreme Court rule prohibiting a lawyer from making extrajudicial statements to the press that he knows or reasonably should know have a "substantial likelihood of materially prejudicing" an adjudicative proceeding (although void for vagueness as interpreted by the Nevada Supreme Court) provides a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the state's interest in fair trials. A majority of the Court reasoned that the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than the "clear and present danger" test established for regulation of the press in Nebraska Press Ass'n. v. Stuart, 427 U.S. 539 (1976), in part because lawyers' extrajudicial statements are likely to be received as especially authoritative, since lawyers have special access to information through discovery and client communication.

81. In J.W. Carney, Jr. and Janis Bassil v. A Justice of the Superior Court, SJ-96-0096 (Mar. 1, 1996)(Wilkins, J.), a single justice of the Supreme Judicial Court, although not faced with ruling on the constitutionality of Massachusetts' existing disciplinary rule, stated the "reasonable likelihood of prejudice" standard "is too broad and arguably too vague"; in contrast, he found that the "substantial likelihood of materially prejudicing" standard, articulated in proposed Massachusetts Rule of Professional Conduct 3.6, appeared to meet current First Amendment requirements, citing Gentile v. State Bar of Nevada, 501 U.S. 1030, 1075 (1991). In Carney, the single justice modified one provision, and deleted another provision, of the "gag" order imposed by the trial judge. Although the trial judge had adopted the "substantial likelihood of materially prejudicing" standard in imposing the "gag" order, the single justice found the judge had not sufficiently shown how, after jury selection, extrajudicial comments of counsel would create a substantial likelihood of materially prejudicing the interests of the defendant or the Commonwealth in obtaining a fair trial. The single justice held that in order to impose a restraint on speech, the trial judge must make findings of fact based on evidence demonstrating a compelling interest

in the imposition of the restraint: A conclusionary statement that future publicity generated by counsel will create a substantial likelihood of material prejudice to a fair trial is not enough to warrant a "gag" order. The single justice stated that although the trial judge may be able to make findings to support her order, "once a jury has been selected, a finding of a substantial likelihood that the jury will be materially prejudiced by publicity, particularly lawyer generated publicity, may not be easily made."

The single justice deleted the provision of the trial judge's order which had barred counsel from making protective comments to counteract substantial undue prejudice from recent publicity not initiated by counsel or client, finding the order may inhibit the right to speak publicly permitted under the "substantial likelihood of materially prejudicing" standard. See also Heidi L. Krizer v. PI ETA Speaker's Assoc., Inc., 90-J-804 (Nov. 30, 1990)(Dreben, J.)(vacating a gag order placed on plaintiff, plaintiff's counsel, and his employees or associates pursuant to Supreme Judicial Court Rule 3:07 Canon 7, DR. 7-107(G), finding defendants had not been able to show a violation of the Canon due to the vagueness of the Canon, and suggesting Canon's vague language even may be unconstitutional). But see United States v. Cutler, 815 F. Supp. 599, 612-16 (E.D.N.Y. 1993)(New York local rule using a "reasonable likelihood of prejudice" standard is constitutional; by finding the "substantial likelihood standard" to be "a constitutionally permissible balance" between the First Amendment rights of attorneys and the state's interest in fair trials, the Supreme Court, in Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991)(emphasis added), was implying that the "substantial likelihood" standard was one of many standards governing extrajudicial attorney speech that conceivably could pass constitutional muster).

82. In Care and Protection of Edith, 421 Mass. 703 (1996), the Supreme Judicial Court vacated an order that directed the parties not to "discuss any aspect of the ongoing proceedings with any member of the media . . . if it is reasonable to believe that the information communicated will lead to the identity of the subject children," finding it was an unconstitutional prior restraint on the right of the father to comment on the judicial proceedings and on the conduct of the Department of Social Services. (Although the order included a prior restraint on both the parties and the parties' attorneys and agents, the court's holding was based on the father's challenge to the order). Citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976), the court held that any attempt to restrain speech must be justified by a compelling state interest to protect against a serious threat of harm. Any order seeking to enjoin speech must be based on detailed findings of fact that (a) identify the compelling interest that the restraint will serve and (b) demonstrate that no reasonable, less restrictive alternative to the order is available.

See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32-33 (1984)(citation omitted)(a

newspaper, which was itself a defendant in a libel action, could be restrained from publishing material about the plaintiffs and their supporters to which it had gained access through court-ordered discovery; "[a]lthough litigants do not 'surrender their First Amendment rights at the courthouse door,' those rights may be subordinated to other interests that arise in this setting," for example, "on several occasions [the court has] approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant"); Levine v. United States Dist. Ct., 764 F.2d 590, reh'g denied, 775 F.2d 1054 (9th Cir. 1985)(en banc), cert. denied, 476 U.S. 1158 (1986)(gag order on trial participants - attorneys and parties and their agents and representatives - in criminal espionage trial was not an unconstitutional prior restraint, because serious and imminent threat to the administration of justice existed and trial court had correctly found that alternatives of voir dire, change of venue, postponement, and sequestration would either be ineffective or counterproductive); cf. In re Russell, 726 F.2d 1007 (4th Cir.), cert. denied, 469 U.S. 837 (1984)(protective order gagging individuals who may be called as prosecution witnesses from making any extra-judicial statements was not an unconstitutional prior restraint, but rather was a restriction on trial participants permitted by Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) and Sheppard v. Maxwell, 384 U.S. 333 (1966)).

83. See, e.g., Abraham S. Goldstein, Jury Secrecy and the Media: The Problem of Post-verdict Interviews, 1993 U. Ill. L. Rev. 295; Robert L. Raskopf, A First Amendment Right of Access to a Juror's Identity: Toward a Fuller Understanding of the Jury's Deliberative Process, 17 Pepp. L. Rev. 357 (1990).

84. See, e.g., Journal Pub. Co. v. Mechem, 801 F.2d 1233 (10th Cir. 1986)(granting newspaper's petition for writ of mandamus directing district court to dissolve its post-trial order prohibiting press interviews with jurors in a civil case, finding it was overbroad and therefore an unconstitutional prior restraint); In re Express-News Corp., 695 F.2d 807 (5th Cir. 1982)(local district court rule which prohibited any person from interviewing any juror concerning the deliberations or verdict of the jury, except by leave of court, unconstitutional as applied, because a court rule cannot restrict the journalistic right to gather news unless it is narrowly tailored to prevent a substantial threat to the administration of justice; the burden is on the government to demonstrate the need for curtailment); United States v. Sherman, 581 F.2d 1358, 1361 (9th Cir. 1978)(press has presumptive constitutional right to conduct post-verdict interviews of jurors and government's burden in overcoming presumption is to show "clear and present danger" or "serious and imminent threat to a protected competing interest"); Ohio ex rel. Beacon Journal Pub. Co. v. McMonagle, 8 Media L. Rep. 1927 (Ohio App. 1982)(trial court

cannot, at conclusion of criminal trial, require jurors to remain silent concerning trial); cf. Haeberle v. Texas Intern. Airlines, 739 F.2d 1019 (5th Cir. 1984)(trial court properly denied losing party leave to interview jurors about basis for civil verdict, since juror privacy and public interest in well-administered justice "plainly outweigh" First Amendment rights of litigant and its counsel, but drawing explicit distinction between attorney interviews of jurors designed to "satisfy curiosity" and improve advocacy techniques, and press interviews of jurors).

85. See, e.g., United States v. Harrelson, 713 F.2d 1114 (5th Cir. 1983), cert. denied, 465 U.S. 1041 (1984)(constitutionally permissible for trial court in highly publicized murder trial to prohibit persons from inquiring into the specific vote of any juror other than the juror being interviewed and from making repeated requests for interviews once a juror has refused to be interviewed); see also United States v. Franklin, 546 F. Supp. 1133, 1144 (N.D. Ind. 1982)("[t]here . . . is very respectable authority within the federal judiciary which manifests a broad reading of federal judicial power in regard to regulating post-verdict communication with jurors"); cf. United States v. Antar, 38 F.3d 1348, 1363-64 (3d Cir. 1994)(prohibitions against "repeated" juror contacts and against any attempt to resume a juror interview after a juror expresses a desire to conclude it cannot stand in the absence of any finding by the court that harassing or intrusive interviews are occurring or are intended and that the prohibitions are the least restrictive means of preventing harassment; however, even though court of appeals could not ascertain after the fact whether the restriction had been appropriate one year earlier - since the trial court did not provide an explanation for imposing the restriction - it let stand an order forbidding inquiry into the "specific votes, statements, opinions or other comments" of any other juror, since such a restriction is appropriate in certain specific cases).

86. In re Globe Newspaper Co., 920 F.2d 88, 98 (1st Cir. 1990)("[n]othing compels or encourages a juror to be interviewed. To the contrary, a juror may well feel it is better and fairer to his or her fellows to decline to discuss what has occurred, and, in particular, to decline to reveal his fellow juror's comments during deliberations").

87. See United States v. Antar, 38 F.3d 1348, 1363-64 (3d Cir. 1994).

88. M. R. Crim. P., Rule 5(d).

89. G. L. c. 277, § 5 (promising that "the commonwealth's counsel, your fellows' and your own, you shall keep secret").

90. Opinion of the Justices, 373 Mass. 915, 919-20 (1977)(citing New Hampshire Fire Ins. Co. v. Healey, 151 Mass. 537 (1890)).

91. See Opinion of the Justices, 373 Mass. 915, 920 (1977), citing Silverio v. Municipal Court of Boston, 355 Mass. 623 (1969); cf. Butterworth v. Smith, 494 U.S. 624 (1990)(insofar as a Florida statute prohibits a grand jury witness from disclosing his own testimony after the term of the grand jury has ended, it violates the First Amendment).

92. See Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 505 (1st Cir. 1989) (time, place, or manner restrictions only need to be reasonable to survive First Amendment scrutiny); United States v. Webbe, 791 F.2d 103, 107 (8th Cir. 1986)(judge may consider administrative burden and potential violation of defendant's right to a fair trial in evaluating mid-trial request for immediate copies of videotapes introduced as evidence); United States v. Gurney, 558 F.2d 1202, 1210 & n.13, reh'g denied, 562 F.2d 1257 (5th Cir. 1977), cert. denied, 435 U.S. 968 (1978) (permissible to condition inspection of trial exhibits upon clerk's availability).

93. See, e.g., United States v. Peters, 754 F.2d 753, 763-64 (7th Cir. 1985)(although trial judge has the discretion to manage his courtroom and to control access to trial exhibits if that aids in the conduct of an orderly trial, the arbitrary exclusion of a single reporter from access to exhibits goes beyond efficient courtroom management).

94. Cf. Doe v. Registrar of Motor Vehicles, 26 Mass. App. Ct. 415, 427 n.22 (1988)(requester's motivation is irrelevant in determining the public interest served by disclosure, but may be relevant to whether private interests could be harmed by disclosure).

95. See Littlejohn v. Bic Corp., 851 F.2d 673, 683 (3d Cir. 1988)(once case had settled, trial judge had dismissed action with prejudice, trial exhibits had been returned to the parties, and there had been no appeal, the exhibits were no longer a part of the judicial record and "[n]either the First Amendment nor the common law right of access empower[ed] the district court to require that litigants return such exhibits to the court for the purposes of copy and inspection by third parties"; court noted its analysis was based on more than the change of custody, since if the exhibits had not been returned to the parties, they would have been destroyed by the clerk according to the local rules).

96. District Court Special Rule 211(A)(5)(a).

